Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; MICHAEL D. RIVES,

Petitioners,

v.

RELIANCE NATIONAL INSURANCE COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court of appeals, sitting in diversity, create a divergent system of law by choosing a rule of decision from other jurisdictions and imposing it upon diversity litigants forced into the federal system or should the prime rule be that "cases dependent" on state law not be "decided differently according to whether they (litigants) are before federal or state courts," *King v. Travelers*, 333 U.S. 153, 157, 158, 68 S. Ct. 488, 491 (1948)?

(a) May a federal court of appeals, sitting in diversity in a *de novo* review to determine insurance coverage, construe the meaning of "named insured" in a clause which excludes coverage of damages arising out of the use of an aircraft owned by the "named insured" to mean **any** person **insured** so as to exclude coverage without consulting state law restricting the meaning and scope of "named insured" in insurance policies?

(b) May a court of appeals, sitting in diversity and predicting state law on a determinative issue, in the absence of a state supreme court decision on the issue, legislatively impose upon diversity litigants its perception of the "majority view" without having either: (i) given proper regard to an intermediate court of appeals opinion directly on point though that opinion may not be cited as precedent in state courts; or (ii) considered other relevant rulings by the state supreme court; or (iii) certified the question to the supreme court of the state when the supreme court has shown an interest in considering the issue?

(c) Should this Court resolve the split between the circuit courts of appeal on the deference to be given decisions

of intermediate state courts of appeal by federal courts sitting in diversity in the absence of a state supreme court decision — the "must follow" rule versus the "proper regard" rule versus the "it is proper to look" rule?

2. May a federal court of appeals, sitting in diversity to determine the effect of a "named insured" owned aircraft exclusion on an insured (but not a **named** insured) judgment debtor who crashed and caused the death of one judgment creditor and paralysis of another fail to apply the seminal holding in a recent decision by another panel of its own circuit predicting applicable state law on the effect of a "separation of insureds" clause on exclusions applicable to named insureds versus non-named insureds?

3. May a court of appeals, sitting in diversity in a *de novo* review, make a conclusion on a determinative issue without providing any rationale or basis for its conclusion; are diversity litigants in federal courts of appeal entitled to any minimal due process rights such that this court's supervisory powers and obligations should be brought to bear?

LIST OF PARTIES

A. PETITIONERS:

1. Lelia Branning Tucker, mother of April Tenille Branning;

2. Lester Branning, father of April Tenille Branning;

3. Scott Branning, brother of April Tenille Branning; and

4. Michael B. Rives.

B. RESPONDENT:

1. Reliance National Insurance Company

C. OTHER PARTIES NOT INVOLVED IN THIS LITIGATION:

1. Tomlinson Avionics of Mississippi, Inc., judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4;

2. Tomlinson Avionics, Inc., judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4;

3. The Estate of Michael D. Tomlinson, judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4; and

4. Hinds Community College District, defendant in Civil Action No. 95-10 and Civil Action No. 96-4, dismissed on summary judgment in the Circuit Court of Hinds County, Mississippi, affirmed on appeal to the Mississippi Supreme Court.

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The Petitioners, Heirs and Wrongful Death Beneficiaries of April Tenille Branning, and Michael Rives, having received an unfavorable decision by the United States Court of Appeals for the Fifth Circuit, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for t e Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Reliance Nat. Ins. Co. v. Estate of Tomlinson*, 171 F.3d 1033 (5th Cir. 1999) (App. A). The United States Court of Appeals for the Fifth Circuit filed their order denying petitioners' petition for rehearing on June 2, 1999 (App. C). The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, in *Reliance National Insurance Company v. Estate of Michael D. Tomlinson, Deceased, et al.*, Civ. A. No. 3:97-CV-663BN, which was entered on June 22, 1998, is not published, but can be found at App. B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision affirming the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division on April 20, 1999 (App. A). The court of appeals denied a timely petition for rehearing on June 2, 1999 (App. C).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of an aircraft crash which resulted in the death of April Branning and permanent paralysis to Michael Rives. Ultimately, final judgments in the amounts of $2,471,000 and $2,750,000 were granted to April's heirs and Michael, respectively, against the Estate of Michael Tomlinson and the two (2) Tomlinson corporations. The aircraft was owned by Tomlinson Avionics, Inc., one of the defendants. Michael Tomlinson was the airport manager for Hinds Community College, but not an employee. *Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Community College Dist.*, Miss. (1999); 1999 WL 191846 (Miss.).

The Tomlinsons were insured under a rider to Hinds' general liability policy. The rider was called *Special Airport Provisions* and extended coverage to "[a]ny airport manager of the **named insured**. . . ." (emphasis in original). Clause 4(b) of that one-page rider excluded "[t]hat **portion** of any loss arising out of the **ownership or use of aircraft** . . . with respect to which the **insured** has other valid and collectible insurance, whether primary or excess."[1] Pretty straight forward excess coverage — or so the plaintiffs thought.

The petitioners filed garnishment proceedings in state court. Reliance National Insurance Company, respondent to this petition, knew that even if it were able to convince Mississippi trial and appellate courts that "named insured" meant "any insured," notwithstanding Mississippi law to the contrary, and that 4(b) was not the applicable exclusion **and** did not create an ambiguity as to exclusion (therefore,

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1. *See Special Airport Provisions* attached at App. F.

coverage under Mississippi law), it would still face the prospect of being before the Mississippi Court of Appeals, which in October 1995 had decided *Providence Washington Insurance Company v. Carol English, et al.*, Number 93-CA-00921 COA[2] directly on point and squarely against Reliance's position.

Reliance removed the garnishment proceedings to United States district court to have the federal court system decide whether, under Mississippi law, there was coverage. Though the matter was set for hearing, the district court notified petitioners by phone just before the hearing that it had decided against them; an opinion was to follow. The district court's opinion was that there was no coverage and gave judgment accordingly. The opinion never mentioned 4(b); the opinion is attached as App. B.

The petitioners appealed. The fifth circuit court of appeals did not tarry long with 4(b) either, concluding without offering any rationale that the partial exclusion of 4(b) relating to aircraft owned by the airport manager, and a total exclusion found in the body of the policy (referred to by Clause 3[3] of the rider) were consistent.[4]

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2. Excerpts from the first, ninth and tenth pages of Providence are attached as App. D, and the subsequent dismissal as offered to the fifth circuit is attached as App. E.

3. Clause 3 provided, "3. The exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the **insured** or **in flight** by or for the account of the **insured**." *See* App. F.

4. A copy of the fifth circuit court opinion is attached as App. A.

The opinion simply does not mention a Mississippi Court of Appeals opinion directly on point and squarely opposite to the opinion's "*Erie* guess"; fails to comment on petitioner's suggestion that the state law question be certified to the Mississippi Supreme Court; fails to provide any basis for its conclusion regarding Clause 4(b) being consistent with total exclusion;[5] and fails to discuss the "interpretative" holding in an intervening decision by another panel of its own circuit predicting Mississippi law on the "interpretative issue," that is, the reach of exclusions when a policy has a "separation of insureds" clause.

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5. Under Mississippi law, if the reach of an exclusion is not clear, or if, in isolation or when compared to another exclusion, an ambiguity appears, then the exclusion is not valid. Also, if there is any reasonable interpretation of a policy so as to provide coverage or to avoid an exclusion, then, under Mississippi law, there is coverage even if there is a competing reasonable interpretation which would deny coverage, *Caldwell v. Hartford*, 248 Miss. 767, 160 So. 2d 209, 231 (Miss. 1964); *State Farm Mutual Auto Insurance v. Scitz*, 394 So. 2d 1371, 1372 (Miss. 1981); *Nationwide Mutual Insurance Company v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994); *Brown v. Hartford Insurance Company*, 606 So. 2d 122, 126 (Miss. 1997). The exclusion which the fifth circuit opinion holds that 4(b) is consistent with provides, "This insurance does not apply: . . . (b) to **bodily injury** or **property damage** arising out of the ownership . . . of . . . any . . . **aircraft** owned or operated by . . . the **named insured**. . . .", *see* Page One of the Comprehensive General Liability Insurance — Coverage Part attached as App. G.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL COURT SITTING IN DIVERSITY MAY NOT SIMPLY IMPOSE UPON DIVERSITY LITIGANTS ITS PERCEPTION OF THE MAJORITY VIEW ON A DETERMINATIVE POINT OF LAW IN THE ABSENCE OF A RULING BY THE HIGHEST COURT IN THE STATE WITHOUT GIVING PROPER REGARD TO A STATE COURT OF APPEALS OPINION DIRECTLY ON POINT, OR WITHOUT HAVING EXHAUSTIVELY EXAMINED ALL DATUM OF THE CONTENT OF STATE LAW ON THE ISSUE OR WITHOUT CERTIFYING THE QUESTION TO THE HIGHEST COURT OF THE STATE.

The fifth circuit's decision predicting Mississippi law failed to give "proper regard" to the prerogatives of the state of Mississippi through its courts to develop its own body of law. Rather it imposed upon diversity litigants its perception of the majority view or better rule without a full analysis of all "datum" available from Mississippi judicial sources, totally ignoring a Mississippi Court of Appeals opinion directly on point and by failing to certify the question to the Mississippi Supreme Court in light of the Mississippi Supreme Court's obvious inclination to decide the issue as shown by its grant of certiorari in *Providence.* It also failed to consider Mississippi law on the reach of the term "named insured" in insurance policies.

A. The Failure To Give Proper Regard.

In *West v. American Telephone and Telegraph Company*, 311 U.S. 223, 61 S. Ct. 179 (1940), bench and bar was taught that a federal court sitting in diversity was not free to choose rules of decision for state courts:

> [t]he obvious purpose of §34 of the *Judiciary Act* is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in cases of diversity of citizenship. That object would be thwarted if federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken . .

Id. U.S. at 236, S. Ct. at 183. The Court in *West* went on to hold:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them . . . it is the duty of the former (federal courts sitting in diversity) in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the view point of 'general law' and however much the state rule may have departed from prior decisions of federal courts . . . [a state court of appeals decision] is a datum for ascertaining state law which is not to be disregarded. . . .

Id. at U.S. 236-238. The federal court sitting in diversity must follow the pronouncement of law of inferior state courts regardless of whether another court of appeals in the state may later arrive at a contrary decision, *id.* at U.S. 236-238, S. Ct. 183, 184. Apparently, the state court decision in *West* was an unpublished county court decision because the opinion refers to a filing of the lower appellate court opinion in the record before the court rather than a formal citation, *id.* at U.S. 233, S. Ct. 181.

The Mississippi Court of Appeals rejected the so-called "majority rule" first **imposed on Mississippi litigants in diversity cases in *Love v. McDonough*, 758 F. Supp. 397 (S.D. Miss. 1991), *aff'd without opinion*, 947 F.2d 1486 (5th Cir. 1991)**[6] and followed by the fifth circuit in the case *sub judice*. *Providence* held that, when other acts of negligence which do not involve directly and precede the use of the owned instrument are alleged, such as negligent entrustment and negligent supervision, the mere fact that an excluded instrumentality was used did not result in non-coverage.[7]

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6. Coincidentally, the author of *Love* was the same district court judge in the case *sub judice*. However, the insurance policy in *Love* and each of the cases in the so-called majority clearly excluded automobiles (instrumentalities: automobiles, aircraft, etc.) owned by "**any** insured," which is not the case here.

7. In addition to alleging negligent entrustment and negligent supervision, the plaintiffs had alleged negligence in appointing an immature and irresponsible person as the official in charge of the airport operations, negligent failure to enforce Hinds and FAA safety rules as required by the airport manager contract, and negligent failure to provide safety policies prohibiting drinking and flying so that all employees, including Michael Tomlinson, would be constantly aware of them, and the failure to post warning signs and notices regarding safety.

Of course, it is axiomatic that there can be no liability without a subsequent negligent use; in the absence of such, there would be no injury and certainly no causal connection. However, the use of the "owned" vehicle was only the factual and not the legal cause; the vehicle or the instrumentality involved only the proximate cause element, factually, which connected with the breach of duty to make out the cause of action. Therefore, the exclusion did not apply.

It was for Mississippi courts to say whether the rule announced in *Providence* or the so-called majority rule imposed on state courts by *Love* was to be followed in the state of Mississippi. Deference to the state of Mississippi (not deference to federal court opinions, *see* footnote 11 of the opinion) by either discussing *Providence* or certifying the question to the Mississippi Supreme Court would have given "proper regard" to the perquisite of Mississippi courts to decide its own jurisprudence. As this court in *King v. United Commercial Travelers of America* stated, "[i]t is inadmissable that cases dependant upon that (state) law should be decided differently according to whether they are before federal or state courts," *id.* at U.S. 157, 158, S. Ct. 491. The fifth circuit decided this case differently than any court in the state of Mississippi would have; that is why federal jurisdiction was invoked by Reliance.

The fifth circuit cited the district court opinion in *Love* as authority for the "majority rule" (*see* opinion at page 9a, footnote 11, attached hereto as App. A) in apparent contradiction to *Salve Regina College v. Russell*, 499 U.S. 225, 236-239, 111 S. Ct. 1217, 1222-1225 (1991). The fifth circuit failed to acknowledge Mississippi case law as stated by the Mississippi Supreme Court on the strict meaning and reach of the term "named insured" in insurance policy

language,[8] and even failed to acknowledge *Providence* which was the only "exposition" of Mississippi state law on the subject of the reach of instrumentality exclusions, in violation of this court's decision in *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 518 (1972) (involved Georgia's intermediate court, a court of "statewide jurisdiction" as is the Mississippi Court of Appeals). On one hand, the court of appeals ignored "datum" of state law in the form of *Providence*, and, on the other hand, deferred to a district court's prediction of Mississippi law in contradiction to *Salve* at U.S. 238, S. Ct. 1224, "no form of appellate deference is acceptable."

The Mississippi Court of Appeals' opinion in *Providence*[9] was like the lower court decision in *Fidelity*

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8. The term "named insured" enjoys a special and specific meaning under Mississippi law. Both the courts and the legislature clearly distinguish between the term "named insured" in insurance provisions and non-named insureds as defined within the terms of a policy or statute, *Aetna Casualty v. Barker*, 451 So. 2d 731, 733, 734 (1984). (Based on definition of "named insured" an extension of coverage to any automobile not owned by a "named insured" coverage was denied to an other insured (uninsured motorist)). *Harris v. McGee*, 537 So. 2d 646, 656 (1990) (Uninsured motorist coverage denied because of non-named insured status); *Rompy v. State Farm Mut. Auto Insurance Co.*, 278 So. 2d 428, 433 (1973) (A requirement that the named insured give notice as a condition precedent to recover not applicable to other insureds). *Stevens v. United States Fidelity and Guaranty Co.*, 345 So. 2d 1041, 1043 (1977) (Named insureds and other insureds are distinct classes of insureds).

9. At the time of the Mississippi Court of Appeals decision in *Providence*, the Mississippi Court of Appeals was an appellate court of statewide jurisdiction, an arm of the supreme court, and its opinions (in the absence of the Mississippi Supreme Court granting

(Cont'd)

Union Trust Company v. Field, 311 U.S. 169, 178, 61 S. Ct. 176, 178 (1940), "[j]udicial action [ ] and there is no other evidence of the state law in this relation." Also, like the lower court opinion in *Fidelity*, the Mississippi Court of Appeals' opinion involved "[t]he possibility that [ ] it will not be followed by the supreme court . . . or even by the court of chancery (court of appeals) itself," *id.* at U.S. 178, S. Ct. 179. Nevertheless, in the absence of more convincing evidence of state law, this Court held that federal courts must follow such a lower court formulation of state law when sitting in diversity, *id.* at 178.

In *King v. Travelers*, 333 U.S. 153, 68 S. Ct. 488 (1948), this Court held that even state trial courts whose decisions may be "ignored by other courts of common pleas" and whose decisions are "binding solely upon the parties before the court" and which are "in effect only another court of the state" were "properly attributed some weight," *id.* at U.S. 160, 161, S. Ct. 492, 493.

B. Failure To Certify The Question To The State Supreme Court.

Though the deference given state lower courts of appeals' decisions under the *Rules of Decision Act*,

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(Cont'd)
and hearing a case on *writ of certiorari*) were final. At the time of the decision, the decisions of the Mississippi Court of Appeals were not officially published but were available to bench, bar and public through the internet from the Mississippi Supreme Court's official website. They were not to be cited as binding legal precedent and were not to be referred to by any other court. Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence* 65 Miss. L.J. 593, 623-628, Spring 1996; *See also Harris v. State*, 704 So. 2d 1286, 1288 (Miss. 1997).

28 U.S.C.A. § 1652, varies between the circuits, no circuit holds that a state lower court of appeals' decision directly on point may be totally disregarded or that a federal court may simply impose its perception of the "majority view" on diversity litigants without a thorough review of state law or without certifying the question to the state supreme court.

If the fifth circuit thought it inappropriate to rely on *Providence*, it should have, either on its own motion or at the suggestion of the petitioners, certified the question to the Mississippi Supreme Court under Mississippi Supreme Court Rule 20 rather than intrude on the prerogative of Mississippi courts to control Mississippi jurisprudence. As the seventh circuit case, *Lexington Insurance Company v. Rugg and Knopp, Inc.*, 165 F.3d 1087, 1093 (7th Cir. 1999), pointed out, if the federal court predictions are erroneous then:

> [U]ntil corrected by the state supreme court, [they] inevitably skew the decisions of [those] who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state's supreme court; they even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent.

Delores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1681 (1992). The Mississippi Supreme Court had granted certiorari in *Providence*, but the parties settled that case and it was dismissed before the supreme court could rule. Rule 20(A) of the Mississippi Supreme Court's rules allows the certification of questions to it.

C. This Court Should Resolve The Split Between The Circuits On The Deference To Be Given Intermediate Court Of Appeals' Decisions.

As to the rules followed by the various circuits, there is a split. The circuits seem roughly divided between a "must follow unless contradicted by higher court decision" rule, a "proper regard" rule, and an "it is proper to look" rule. Even within some circuits there is discrepancy on the amount of deference to be given state court of appeals decisions. An example of such discrepancy is found in *Sellers v. Allstate Insurance Company*, 82 F.3d 350, 409 (10th Cir. 1996),

> [w]e are not required to follow . . . *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869 (10th Cir. 1993) . . . but see *Lowell States Mining Company v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1269 (10th Cir. 1989), *citing West v. AT&T*, 311 U.S. 223, 236-37, 61 S. Ct. 179, 183 (1940) "[f]ederal court must follow an intermediate state court decision". . . .

Some circuits hold that a state intermediate court of appeals decision must be followed unless it contradicts state statutes or other state supreme court decisions even if it is bad policy, wrong or contrary to the majority rule, *Assicurazioni v. Neal*, 160 F.3d 997, 1003 (4th Cir. 1998); *Lexington Insurance Company v. Rugg and Knopp*, 165 F.3d 1087, 1093 (7th Cir. 1999) ("[m]oreover, federal pronouncements on the content of state law inherently involve a significant intrusion on the prerogative of the state courts to control that development" at 1093); *Nelson v. Irvine*, 143 F.3d 119 (9th Cir. 1998) (must follow); *Veale v. Citibank*, 85 F.3d 577, 588 (11th Cir. 1996) (must follow

lower state appellate court decision which was contrary to prior "*Erie* guess" on the same issue); *Doyle v. Volkswagenwerk*, 81 F.3d 139, 142 (11th Cir. 1996) (question certified rather than not follow lower court opinion; the fifth circuit failed to comment on the Brannings' and Rives' suggestion that the question be certified to the state supreme court).

The second, third and sixth circuits seem to follow a mid position which requires giving the "fullest weight" and "proper regard" to lower state court opinions in the absence of contradictory state supreme court decisions. *First Investors Corporation v. Liberty Mutual Insurance*, 152 F.3d 162, 165 (2nd Cir. 1998); *2-J Corporation v. Tice Construction Company*, 126 F.3d 539, 541 (3rd Cir. 1997) ("In the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts. . . ."); *Ziebart International Corp. v. CNA Insurance Companies*, 78 F.3d 245, 250, 251 (6th Cir. 1997) ("A datum for ascertaining state law **which is not to be disregarded** . . . .", at 250 (emphasis added)).

The fifth circuit follows an it is "proper to look" standard, *Shanks v. Allied Signal, Ins.*, 169 F.3d 988, 993, 994 (5th Cir. 1999); *Federal Deposit Ins. Corp. v. Abraham*, 137 F.3d 264, 268, 269 (5th Cir. 1998) (court of appeals panel is not required to follow intermediate state court of appeals' holding which is contrary to a prior fifth circuit panel holding); *Matheny v. Glenn Falls Insurance Company*, 152 F.3d 348, 354 (5th Cir. 1998) (Decisions of intermediate courts are not controlling).

The fifth circuit court of appeals follows a rule which allows it to choose its preference of law and impose its

perception of the majority view or the "best" reasoning upon the states rather than accord the state's courts and, ultimately, the state itself its due under the *Rules of Decisions Act* and its rights and prerogatives as a separate state under our federalist system. Simply adopting the majority view is no substitute for certification of the issue to the state supreme court, *Lexington Insurance* at 1093, "[a] federal court must be careful to avoid the temptation to impose upon a state what it or other jurisdictions might consider to be wise policy. That other jurisdictions favor a policy cannot weigh heavily in a federal court's determination in an unsettled area . . ." *Assicurazoni* at 1003.

II.

BY IGNORING AN INTERVENING FIFTH CIRCUIT DECISION PREDICTING STATE LAW ON THE REACH OF EXCLUSIONS IN THE FACE OF "SEPARATIONS OF INSUREDS" CLAUSES, THE FIFTH CIRCUIT OPINION, AGAIN, IGNORED STATE LAW ON A DETERMINATIVE ISSUE IN ITS OPINION.

The opinion totally ignores the "interpretative issue" in the fifth circuit's intervening opinion in *Centennial Insurance Company v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 380, 384-387 (5th Cir. 1998). Any doubt that the **two** owned aircraft exclusions, the "named insured" exclusion "in the policy" and the partial owned aircraft exclusion in rider 4(b), applied **separately** to the "named insured", Hinds, and the other insured, the Tomlinsons, so as to restrict the reach of the exclusion "in the policy" to the "named insured" under Mississippi law was erased by the fifth circuit's prediction of Mississippi law on the "interpretative issue before us", *Centennial* at 383. The interpretative issue was "[t]he effect

of an automobile insurance policy's severability of interests clause worded like the separation of insureds provision . . . containing the phrase 'against whom a claim or suit is brought' or very similar language on policy exclusions . . . ."[10] *Id.* at 386.

If the separation of insureds clause requires a separate analysis when a corporate party urges it upon the fifth circuit, why does it not compel the same separate analysis for the individual, personal injury litigant? The clause in the Reliance policy contains the same key language, "The insurance afforded applies separately to each insured against whom claim is made or suit is brought"[11]

If, as stated in the fifth circuit's decision in *Federal Deposit Insurance Corp.* at 268, *stare decisis* requires that one circuit court panel adhere "without exception" to a decision of a prior panel, why was the decision on the "interpretative issue" in *Centennial* ignored in this case? We were not told.

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10. The fact that *Centennial* involved an "employee of insured" exclusion does not change the holding regarding the method of analysis under Mississippi law compelled as a result of a separation of insureds clause. *Centennial* was handed down after petitioners' initial brief to the fifth circuit, but its citation in their rebuttal briefs and *Petition for Rehearing* alerted the fifth circuit panel to the decision on the "interpretative issue." However, its decision on the "interpretive issue" was not discussed in the fifth circuit's opinion at all.

11. *See* Page Three of the policy, attached hereto as App. G.

III.

AN OPINION WHICH SIMPLY MAKES AN UNREASONED CONCLUSION ON A DETERMINATIVE ISSUE FALLS BELOW THE MINIMUM STANDARD DUE A CIVIL LITIGANT, EVEN A DIVERSITY LITIGANT, IN FEDERAL COURT SUCH THAT THIS COURT'S SUPERVISORY POWERS ARE CALLED ON, NOT ONLY TO CORRECT AN OBVIOUS WRONG AND SEE TO IT THAT FEDERAL COURTS PROVIDE MINIMAL DUE PROCESS IN ITS APPELLATE PROCEDURES, BUT ALSO TO MAKE UNIFORM THOSE STANDARDS DUE DIVERSITY LITIGANTS THROUGHOUT THE FEDERAL SYSTEM.

Without any explanation, rationalization or supporting analysis, the opinion simply concludes on page 7, with the force of logic attending the flip of a coin, that 4(b) is consistent with that court's interpretation that Clause 3 is a total exclusion of all coverage for damages arising from the ownership or use of planes owned by any insured. **Petitioners challenge any court, including this court, to provide a reasonable explanation of Clause 4(b)'s purpose if not to provide the applicable exclusion for aircraft owned by the airport manager.**

A clause which is clear and unambiguous (say Clause 3) when read in isolation but becomes unclear or uncertain when read with another clause (say Clause 4(b) or the declaration page[12] which identifies the only "named insured" as Hinds Community College) fails as an exclusion under

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12. *See* the *Airport Liability Insurance Policy* declarations page attached as App. F.

Mississippi law. *Nationwide v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994). Even if there are two or more reasonable interpretations of a clause, the court **must** adopt the one that provides coverage, *Nationwide* at 662.

Any doubtful provision must be read against the insurer under the law of the state of Mississippi, *State Farm Mutual Auto. Ins. Co. v. Scitz*, 394 So. 2d 1371, 1372 (Miss. 1981). Exclusion clauses, particularly, must be interpreted favorably to the insured; they must be strictly restricted and given the more narrow application possible, *id.* at 1373. Any reasonable explanation consistent with non-exclusion must be accepted, even if there are reasonable interpretations favoring exclusions, *Caldwell v. Hartford Accident and Indemnity Company*, 248 Miss. 767, 160 So. 2d 209, 213 (Miss. 1964).[13]

It is so obvious that Clause 3's purpose in the *Special Airport Provisions* is to **restrict and bring into the *Special Airport Provisions*** the "named insured" owned aircraft exclusion "in the policy", and the purpose of 4(b) is to provide an exclusion for aircraft belonging to the airport manager. It just so happens that that exclusion, 4(b), is a partial exclusion, only excluding damages otherwise covered by insurance. At the least, it is a reasonable interpretation of the policy that, without 4(b), there would be no exclusion of any kind for aircraft owned by the insured airport manager.

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13. *See* Page One of the *Comprehensive General Liability Insurance — Coverage Part* attached as App. G for the "named insured" owned aircraft exclusion and Page Four at App. G for the definition of "named insured."

At some point even personal injury claimants forced into the fifth circuit system by removal must be protected by this court's supervisory powers as set out in United States Supreme Court Rule 10(a):

> [i]t is inadmissable that cases dependant on that (state) law should be decided according to whether they are before a federal or state court. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one of the parties to chose whether the case is tried in federal or state court.

King at 333 U.S. 153, 157, 68 S. Ct. 488, 491 (1948).

CONCLUSION

It is obvious that Reliance had read *Providence* and knew that its chances in state court were slim indeed. No Mississippi court would have failed to see that 4(b) had no purpose other than to provide an exclusion not otherwise provided, albeit a partial (covered by other insurance) one. No Mississippi court would have construed "aircraft owned by the named insured" to include aircraft owned by any insured as the fifth circuit opinion did. Only when seeing both, does harmony of the exclusions and consistency of the insurance policy appear so as to make a sensible, whole contract, *Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1997).

Even if the state courts had bought both the "named insured means any insured" argument and the "4(b) is consistent and has no purpose argument", it still would have been faced with the court of appeals decision in *Providence.*

The outcome would have been different in the Mississippi system! Having its choice of forum, Reliance simply decided early to put all its eggs in the federal system's basket.

To allow the fifth circuit decision in this case to stand would truly be perpetuating "two divergent or conflicting systems of law," *West* at U.S. 236 S. Ct. 183. The *Rules of Decision Act* **"commands"** that federal courts give proper regard to state law, "The ideal aimed at by the Act is, of course, uniformity of decision within each state." *King* at 157. This Court should not sanction such a dual system but must grant certiorari in this case in order to prevent injustice to these litigants and to prevent the perpetuation of injustice to other diversity litigants.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 20, 1999

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-60486
Summary Calendar

RELIANCE NATIONAL INSURANCE COMPANY, a corporation,

Plaintiff-Counter Defendant-Appellee,

versus

ESTATE OF MICHAEL D. TOMLINSON, Deceased, Et Al.,

Defendants,

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; LESTER BRANNING; SCOTT BRANNING; MICHAEL D. RIVES,

Defendants-Counter Claimants-Appellants.

* * * * *

Appendix A

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs arid wrongful death beneficiaries of April Tenille Branning; MICHAEL D. RIVES,

Plaintiffs,

versus

ESTATE OF MICHAEL D. TOMLINSON; ET AL.,

Defendants.

Appeals from the United States District Court
for the Southern District of Mississippi

Before POLITZ, WIENER, and DENNIS, Circuit Judges.

POLITZ, Circuit Judge:

Michael Rives and the survivors of April Tenille Branning appeal an adverse summary judgment as relates to certain insurance coverage. For the reasons assigned, we affirm.

BACKGROUND

This litigation arises out of a plane crash that occurred after Michael Tomlinson had been drinking alcohol at a local tavern and invited some of the tavern's patrons for a late night airplane ride. From the tavern, Tomlinson and the

others traveled to the John Bell Williams Airport, which he managed. Tragically, the plane piloted by Tomlinson crashed, killing Tomlinson and April Branning, and injuring Michael Rives and Monica Hancock.

Proceeding in state court, appellants sued the Estate of Michael Tomlinson, Tomlinson Avionics, Inc. (Airport Manager by contract), and Tomlinson Avionics of Mississippi, Inc. (Agent of Airport Manager by contract) on the basis that Tomlinson acted within the scope of his employment and that the Tomlinson entities were responsible for their damages. Appellants also sued Hinds Community College on the basis that it was responsible for Tomlinson's acts as leaseholder of the airport. The state court entered summary judgment for Hinds.

The Tomlinson entities were covered by several insurance policies, including policies issued by Titan Insurance Company, Ranger Insurance Company, and appellee, Reliance National Insurance Company. Appellants settled with Titan. In appellants' action against Ranger, the court *à quo* entered summary judgment for Ranger based on an "owned aircraft" exclusion.[1] Appellants and the Tomlinson entities entered into consent judgments by which appellants could recover only against insurance proceeds.

Reliance petitioned for a declaratory judgment declaring that the insurance policy it issued to Hinds did not cover Tomlinson, Tomlinson Avionics, Inc., or Tomlinson

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1. **Ranger Ins. Co. v. Branning**, 984 F. Supp. 466 (S.D. Miss. 1997).

Avionics of Mississippi, Inc.[2] Reliance moved for a summary judgment on the grounds that Tomlinson acted outside the scope of his employment and that a provision of the policy excluded coverage. The district court determined that the policy issued by Reliance did not cover Tomlinson or the Tomlinson entities because of the exclusion, and it entered summary judgment for Reliance. Appellants challenge the grant of summary judgment.

ANALYSIS

We review grants of summary judgment *de novo*.[3] The Federal Rules of Civil Procedure provide that summary judgment shall be entered when there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[4] We must consider the evidence, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party.[5]

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2. The appellants also filed Writs of Garnishment in state court based on the consent judgments. Reliance removed these actions which were consolidated with the declaratory judgment action.

3. **Centennial Ins. Co. v. Ryder Truck Rental, Inc.**, 149 F.3d 378 (5th Cir. 1998).

4. FED. R. CIV. P. 56; **Celotex Corp. v. Catrett**, 477 U.S. 317 (1986).

5. **Deus v. Allstate Ins. Co.**, 15 F.3d 506 (5th Cir. 1994).

Appendix A

Because our jurisdiction is based upon diversity, we apply Mississippi law in interpreting the insurance policies.[6] First, where an insurance policy is plain and unambiguous, the court must construe the instrument exactly as written. Second, the court should read the policy as a whole, giving effect to all provisions. Third, the court must interpret ambiguities against the insurer. Fourth, the court must interpret exclusion clauses narrowly.[7]

Owned Aircraft Exclusion

Appellants first contend that the district court erred in determining that an exclusion clause relieved Reliance of its obligations under the policy. Hinds purchased a Comprehensive General Liability policy to insure itself against particular liabilities that it might encounter as leaseholder of the airport. The policy excluded any bodily injury arising out of ownership, maintenance, operation, use, loading, or unloading of: (1) any aircraft owned or operated by or rented or loaned to the named insured, or (2) any other aircraft operated by any person in the course of his employment by the named insured.

Because Hinds did not intend to serve as manager of the airport, it purchased a rider that provided limited coverage for any airport manager that it appointed. Provision 3 of the

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6. The parties agree that the substantive law of Mississippi governs our decision. **Erie R.R. Co. v. Tomkins**, 304 U.S. 64 (1938).

7. **Centennial Ins. Co.**, 149 F.3d at 382-83 (listing these and other rules of interpretation).

Special Airport Provisions provides that the "exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the insured or in flight by or for the account of the insured." The district court determined that Reliance was not obligated under the policy to provide coverage because Tomlinson Avionics, Inc. owned the plane that crashed and Provision 3 excluded from coverage the injuries suffered by appellants.

Appellants suggest that the "insured" described in Provision 3 was Hinds, and that this exclusion should not apply to the Tomlinson entities. We reject this suggestion. Provision 1 of the Special Airport Provisions extends the coverage of "Persons Insured" to include "any airport manager of the named insured."[8] The policy defined "insured" as "any person or organization qualifying as an insured in the 'Persons insured' provision of the applicable insurance coverage. . . ." We conclude that the Tomlinson entities are "Persons insured."

We find the text of Provision 3, the owned aircraft exclusion, unambiguous, and conclude that it relieves Reliance of any obligation to provide coverage. Tomlinson Avionics, Inc. *owned* the aircraft in question; Tomlinson Avionics, Inc. *loaned* the aircraft to Tomlinson Avionics of Mississippi, Inc.; Tomlinson himself *flew* the aircraft in question. The owned aircraft exclusion applies in each of

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8. The policy extended coverage to any airport manager "acting within the scope of his duties." The district court assumed that Tomlinson was acting within the scope of his duties. For purposes of this decision we make the same assumption.

these instances and relieves Reliance of its obligations under the policy.

Even assuming that this one isolated owned aircraft provision is unambiguous, appellants insist that there is an ambiguity with respect to coverage when the owned aircraft provision is read in light of the next provision, and, the argument continues, the rules of insurance policy interpretation require that ambiguities be interpreted to favor coverage. According to appellants, the ambiguity arises because after the owned aircraft provision that excludes coverage, Provision 4(b) limits "any loss arising out of the ownership, maintenance or use of aircraft . . . with respect to which the insured has other valid and collectible insurance, whether primary or excess." Appellants contend that this provision limiting coverage would be superfluous if the owned aircraft provision actually excluded coverage entirely. Therefore, appellants propose, this contradiction creates an ambiguity which obligates Reliance to provide coverage.

The owned aircraft provision, however, clearly excludes from coverage the injuries of which appellants complain. Mississippi law requires us to give effect to that unambiguous exclusion. Appellants correctly note that the rules of insurance policy interpretation require us to give meaning to every provision. Exclusion from coverage is consistent with both Provision 3 and Provision 4(b); appellants' position runs contrary to Provision 3.

Alternate Theories of Liability

Appellants maintain that regardless of the court's conclusion as to the owned aircraft exclusion, the alternate

causes of action that they asserted, which can be cabined within the theories of negligent entrustment and negligent supervision, do not implicate that exclusion. Appellants contend that these claims are separate and distinct from the ownership or use of an aircraft, and thus fall outside of the reach of the exclusion and give rise to a duty to defend. Therefore, appellants conclude, the district court erred in entering summary judgment for Reliance.

Our research discloses no dispositive decisions by the Mississippi Supreme Court. Accordingly, we must predict how that court would rule. In making this prediction, we should look to: (1) the decisions of the Mississippi Supreme Court in analogous cases, (2) the rationales and analyses underlying those decisions, (3) dicta by the Mississippi Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) decisions by the courts of other states when Mississippi courts have turned to them in formulating substantive law, and (7) other available sources, such as treatises and legal commentaries.[9] Absent evidence to the contrary, we presume that the Mississippi Supreme Court would adopt the majority rule.[10]

Focusing first on negligent entrustment, a majority of jurisdictions addressing the issue have concluded that if an owned aircraft exclusion relieves an insurer of its obligation when the injury arises out of the ownership, operation, or use of the aircraft, then the exclusion similarly relieves

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9. **Centennial Ins. Co.**, 149 F.3d at 382.

10. **Id.**

the insurer of any obligation arising out of negligent entrustment.[11] The majority rule recognizes that liability for the negligent entrustment of an aircraft is derivative of a negligent use of that aircraft.[12] Because an owned aircraft provision excludes coverage for negligent use, the provision also excludes coverage for negligent entrustment. As to automobiles, the established law of Mississippi is that there can be no liability for negligent entrustment without a subsequent negligent use of that automobile.[13] We believe that the Mississippi Supreme Court would extend this rule to aircraft, and we presume that the court would follow the majority rule regarding owned aircraft provisions. It follows

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11. **Allstate Ins. Co. v. Ellison**, 757 F.2d 1042 (9th Cir. 1985); **Fox Hills Country Club, Inc. v. American Ins. Co.**, 570 S.W.2d 275 (Ark. 1978); **State Farm Fire Cas. Co. v. Keenan**, 216 Cal. Rptr. 318 (Cal. Ct. App. 1985); **Great Am. Indem. Co. v. City of Corpus Christi**, 192 S.W.2d 917 (Tex. Civ. App.-San Antonio 1945, writ ref'd n.r.e.) (finding coverage because of an "exception to the exception"); **Transport Indem. Co. v. Sky-Kraft, Inc.**, 740 P.2d 319 (Wash. Ct. App. 1987).

Where decisions are lacking, courts should draw from other fields of insurance law. 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE, §4501.01, at 238 (1979). The majority rule is the same when the issue concerns "owned automobile" exclusions. **Love v. McDonough**, 758 F. Supp. 397, 400-02 (W.D. Miss.) (collecting cases), *aff'd mem.*, 947 F.2d 1486 (5th Cir. 1991).

12. **Fox Hills Country Club, Inc.**, 570 S.W.2d at 277 ("arising out of"); **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 330 ("solely and indivisibly related"); **Transport Indem. Co.**, 740 P.2d at 327 ("indivisibly related").

13. **Somerville v. Keeler**, 145 So. 721 (Miss. 1933).

that because that provision relieves Reliance of any duty to defend against the negligent use of an aircraft, Reliance is also relieved of any obligation to defend against the alleged negligent entrustment of the aircraft.

The majority rule concerning negligent supervision is the same as that concerning negligent entrustment: Negligent supervision claims are excluded from coverage by owned aircraft provisions when the acts alleged could not have resulted in injury but for the use of the aircraft.[14] Negligent supervision is so intertwined with the use of the aircraft that when usage is excluded from coverage, so too are claims of negligent supervision.[15] We believe that the Mississippi

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14. **Littrall v. Indemnity Ins. Co. of N. Am.**, 300 F.2d 340 (7th Cir. 1962) (negligent direction); **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 330-32 (negligent instruction); **Hartford Fire Ins. Co. v. Superior Ct. of Cal.**, 191 Cal. Rptr. 37 (Cal. Ct. App. 1983) (negligent planning); **Safeco Ins. Co. of America v. Husker Aviation, Inc.**, 317 N.W.2d 745 (Neb. 1982) (negligent training & supervision); **Wilkins v. American Motorists Ins. Co.**, 388 S.E.2d 191 (N.C. Ct. App. 1990) (negligent instruction); **Transport Indem. Co.**, 740 P.2d at 327 (negligent instruction); *see also* **Love**, 758 F. Supp. at 402 ("Application of the exclusion is not dependent on the theory of liability asserted.").

15. *E.g.*, **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 332 (negligent instruction "depend[s] on . . . use and operation of an aircraft"); **Safeco Ins. Co. of Am.**, 317 N.W.2d at 748 (negligent training "directly related to the operation" of the aircraft). Our conclusion is consistent with that of the opinion by the district court in a case that originates from the same incident as this one. **Ranger Ins. Co.**, 984 F. Supp. at 469 (excluding from coverage "each and every claim . . . asserted [because each had] as its aim the recovery of damages for bodily injury which arose directly and solely from Tomlinson's use of the aircraft").

Appendix A

Supreme Court would rule consistent with the majority of jurisdictions if it were confronted with this issue. Therefore, we conclude that Reliance was not obligated to provide coverage under any of appellants' theories of liability.

For these reasons, the judgment appealed is AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AND FILED JUNE 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:97-CV-663BN

RELIANCE NATIONAL INSURANCE COMPANY

PLAINTIFF

VS.

ESTATE OF MICHAEL D. TOMLINSON, DECEASED; TOMLINSON AVIONICS OF MISSISSIPPI, INC.; TOMLINSON AVIONICS, INC.; LELIA BRANNING TUCKER; LESTER BRANNING; SCOTT BRANNING; MONICA HANCOCK; AND MICHAEL D. RIVES

DEFENDANTS

OPINION AND ORDER

Reliance National Insurance Company ("Reliance") brings this declaratory judgment action seeking a declaration that it does not have a duty to defend Tomlinson Avionics, Inc. and Tomlinson Avionics of Mississippi, Inc. ("Tomlinson" or "Tomlinson entities") for their liability arising out of an accident involving an aircraft owned by Tomlinson. All parties have filed Motions for Summary

Judgment. The issue is whether Tomlinson is covered under the Reliance policy. Having considered the Motions, briefs of the parties, and applicable legal authorities, the Court finds that Reliance does not have a duty to defend the Tomlinson entities because the Reliance policy excludes coverage for accidents involving airplanes owned by the Tomlinson entities.

I. BACKGROUND

This case arises out of a fatal airplane crash which injured Monica Hancock and Michael B. Rives and killed the pilot Michael D. Tomlinson and April Branning. The crash occurred at the John Bell Williams Airport at Raymond, Mississippi. Rives, Hancock, and the heirs of April Branning filed suit in state court against Michael Tomlinson's estate, Tomlinson Avionics, Inc., Tomlinson Avionics of Mississippi, Inc., and Hinds Community College.

Hinds Community College is the administrative authority for the John Bell Williams Airport. Reliance issued a policy to Hinds that covered Hinds for any liability it may incur as airport manager. This policy contained an exclusion for an accident involving an aircraft owned by the insured.

Before the crash, Hinds leased the airport to Tomlinson Avionics, Inc. Thereafter, Tomlinson acted as airport manager of the John Bell Williams Airport. Tomlinson Avionics, Inc. formed Tomlinson Avionics of Mississippi, Inc. Tomlinson Avionics of Mississippi, Inc. acted as Tomlinson Avionics, Inc.'s agent and fulfilled the obligations of airport manager. The Court will refer to the two entities as the Tomlinson entities.

Appendix B

On October 25, 1994, Michael Tomlinson, an employee of the Tomlinson entities, consumed several beers at Swayze's Recreation Center. While drinking, Tomlinson met April Branning, Monica Hancock, and Michael Rives. He convinced them to take a late night ride in an airplane owned by the Tomlinson entities and piloted by him. The plane crashed shortly after takeoff.

After this accident, Rives, Hancock, and the heirs of Branning ("state court Plaintiffs") filed separate suits in the Circuit Court of the Second Judicial District of Hinds County, Mississippi against Michael Tomlinson's estate, the Tomlinson entities, and Hinds Community College ("Hinds").

The only Defendants left in this litigation are the Tomlinson entities. Summary judgment was granted in favor of Hinds in state court. The state court Plaintiffs settled with Michael Tomlinson's estate and agreed to only seek insurance proceeds that may be available from any insurance the Tomlinson entities procured.

The Tomlinson entities were covered by several insurance policies including policies issued by Titan Insurance Company ("Titan"), Ranger Insurance Company ("Ranger"), and Reliance. Titan agreed to make its policy limits available to the state court Plaintiffs. Summary judgment was granted in favor of Ranger. Thus, Reliance is the only insurance company left in this case.

Reliance filed this declaratory judgment action seeking a determination that the policy of insurance it issued to Hinds

provides no coverage to the Tomlinson entities. All parties have filed Motions for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that

demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962).

III. DISCUSSION

A. Reliance has no Duty to Defend the Tomlinson Entities because the Policy has an Owned Aircraft Exclusion.

The Reliance policy clearly contained an exclusion for "bodily injury" arising from the use of an "aircraft owned by or rented or loaned to the insured or in flight by or for the account of the insured." The allegations in the state court complaint clearly fall within the exclusion. It is undisputed that the Tomlinson entities owned the airplane that crashed.

The Court notes that in a case involving these same facts but a different insurance company, Judge Tom S. Lee granted summary judgment in favor of Ranger Insurance Company

because of an owned aircraft exclusion. *See Ranger Ins. Co. v. Heirs of Branning*, 984 F.Supp. 466, 468-70 (S.D. Miss. 1997). Ranger issued a policy to the Tomlinson entities. Like Reliance's policy, Ranger's policy had an exclusion for bodily injury arising out of the use of an aircraft owned or operated by an insured. Judge Lee found that since the accident arose out of a plane owned by the Tomlinson entities, Ranger did not have a duty to defend. Accordingly, this Court finds that Reliance does not have a duty to defend because this accident involved an aircraft owned by Tomlinson.

B. Does the Exclusion Apply to Tomlinson?

The state court plaintiffs argue that the owned aircraft exclusion only applies to the named insured. They argue that the exclusion does not apply to the Tomlinson entities because the named insured is Hinds.

The Court notes that the policy had a Persons Insured provision which states:

> The "Persons Insured" provision is amended to include any airport manager of the named insured while acting within the scope of his duties.

It is undisputed that the Tomlinson entities were airport managers, thus, they are covered by the insurance policy. Accordingly, the Court finds that the owned aircraft exclusion applies to the Tomlinson entities.

The arguments raised by the state court Plaintiffs are inconsistent. On the one hand, the state court Plaintiffs argue

that the Tomlinson entities are insureds under the Reliance policy in their effort to collect proceeds under the policy. On the other hand, they argue that the Tomlinson entities are not named insureds under the Reliance policy and the owned aircraft exclusion does not apply to the Tomlinson entities. Such a construction of this policy would not comport with logic or common sense. The Court finds that the Tomlinson entities are insureds under the Reliance policy, however, Reliance does not have a duty to defend the Tomlinson entities because the policy excludes coverage for accidents involving airplanes owned by the Tomlinson entities.

III. CONCLUSION

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by Plaintiff Reliance National Insurance Company [52-1] is well taken and is granted.

IT IS FURTHER ORDERED that all other pending motions in this case are denied as moot. The Clerk is hereby ordered to terminate all pending motions in this case including [2-1], [10-1], [18-1], [35-2], [40-1], [61-1], and [67-1].

A Final Judgment will be entered this day as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 22nd day of June, 1998.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED JUNE 2, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60486

RELIANCE NATIONAL INSURANCE COMPANY, a corporation

Plaintiff – Counter Defendant – Appellee

v.

ESTATE OF MICHAEL D TOMLINSON, Deceased; ET AL

Defendants

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; LESTER BRANNING; SCOTT BRANNING; MICHAEL D RIVES

Defendants – Counter Claimants – Appellants

Appendix C

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; MICHAEL B RIVES

Plaintiffs

v.

ESTATE OF MICHAEL D TOMLINSON; ET AL

Defendants

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITIONS FOR REHEARING

Before POLITZ, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are denied.

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX D — EXCERPTS FROM OPINION OF THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI IN *PROVIDENCE WASHINGTON INSURANCE COMPANY v. CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, et al.* DATED AND DECIDED OCTOBER 3, 1995

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 93-CA-00921 COA

PROVIDENCE WASHINGTON INSURANCE COMPANY

APPELLANT

v.

CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, RUSSELL CHASE WEBB, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, KIMBERLY BYRD WEBB AND KIMBERLY BYRD WEBB, INDIVIDUALLY

APPELLEES

* * *

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

Appendix D

ATTORNEY FOR APPELLANT: RICHARD L. KIMMEL

ATTORNEY FOR APPELLEES: J. DEWAYNE THOMAS

NATURE OF THE CASE: DECLARATORY JUDGMENT; INSURANCE COVERAGE

TRIAL COURT DISPOSITION: DECLARATORY JUDGMENT IN FAVOR OF THE APPELLEES

BEFORE FRAISER, C.J., DIAZ, AND PAYNE, JJ.
DIAZ, J., FOR THE COURT:

* * *

[9] However, other state courts have created an alternative line of cases this Court thinks are worth addressing since this is a case of first impression in Mississippi. Those cases hold that where there is an allegation of "acts of negligence which are completely independent of and totally unrelated to [the insured's] ownership and use of the vehicle. . ." the homeowner's policy may provide coverage. *Johns v. State Farm Fire & Casualty Co.*, 349 So. 2d 481, 485 (La. Ct. App. 1977). In *Johns*, the plaintiff sued for damages from injuries sustained from a fall in which a motor vehicle was involved. *Id.* at 481. The trial court granted the homeowner's insurer a summary judgment because of an exclusionary clause for injuries arising out of use of an automobile. *Id.* at 482. The court of appeals reversed the trial court's decision because it concluded that questions of fact remained. *Id.* at 485. Specifically, the court found that if the trier of facts found

that the insured [10] was liable to the plaintiff for negligent supervision, then the homeowner's exclusion for use of a motor vehicle would not apply. *Id.*

This rule of law creates the clear distinction between the case of *Love ex rel. Smith v. McDonough* and the case before the Court. The trier of fact in the underlying negligence and wrongful death suits could find that Webb was liable for negligent entrustment, negligent supervision, and for the wrongful death claim. Upon such a finding then both the homeowner's policy and Webb's automobile policy, if any, could be responsible for the claims. *See State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992) ("An individual may recover against both an automobile and homeowner's policy where two independent acts, one vehicle related [negligent entrustment] and one non-vehicle related [negligent supervision], combine to cause an injury."). Also, in the case of *Frazier v. State Farm Mut. Auto. Ins. Co.*, 347 So. 2d 1275, 1276-77 (La. Ct. App. 1977), the court held that in a negligent supervision suit brought on behalf of a child who was in the care of the insurers' insured when injured by an automobile, the homeowner's insurer could be held responsible for negligent supervision claims. The holding in *Love* is applicable to a case alleging negligent entrustment only. However to cases alleging negligent supervision as well, this Court finds that the above discussed cases make it clear that upon a finding of negligent supervision, the homeowner's policy would provide coverage.

* * * *

APPENDIX E — MANDATE OF THE SUPREME COURT OF MISSISSIPPI IN *PROVIDENCE WASHINGTON INSURANCE COMPANY v. CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, et al.* DATED SEPTEMBER 26, 1996

MANDATE
From the
SUPREME COURT OF MISSISSIPPI

To the Hinds County Circuit Court,
First Judicial District — GREETINGS:

On 5th Day of September, 1996, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #93-CT-00921-SCT
Trial Court Case #9167396

Providence Washington Insurance Company

vs.

Carol English, As Administratrix of the Estate of John Wesley Webb, Russell Chase Webb, By And Through His Mother and Next Friend, Kimberly Byrd Webb and Kimberly Byrd Webb, Individually

Joint Motion to Dismiss Appeal of Providence Washington Insurance Company pursuant to M.R.A.P. 42(b) granted. Appeal dismissed upon entry of this order. Pittman, J.,

Appendix E

Prather and Sullivan, P.JJ., Banks, McRae, Roberts, Smith and Mills, JJ., Concur. Lee, C.J., Not Participating. Any costs remaining shall be paid by Appellant. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Dan Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on September 26, 1996, A.D.

s/ Linda Stone
Supreme Court Clerk

APPENDIX F — AIRPORT LIABILITY INSURANCE POLICY FOR HINDS COMMUNITY COLLEGE/ JOHN BELL WILLIAMS AIRPORT DATED MARCH 7, 1994

AIRPORT LIABILITY INSURANCE POLICY

* * *

☒ Reliance National Insurance Co.
Corporation Trust Center, Wilmington, DE 19801

POLICY NUMBER: NAL196 3703

* * *

DECLARATIONS

ITEM 1. NAMED INSURED: Hinds Community College/ John Bell Williams Airport

* * *

SPECIAL AIRPORT PROVISIONS

* * *

With respect to the premises designated in the policy as an airport and all operations necessary or incidental thereto:

1. The "Persons Insured" provision is amended to include any airport manager of the **named insured** while acting within the scope of his duties as such.

* * *

Appendix F

3. The exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the **insured** or **in flight** by or for the account of the **insured.**

4. The insurance does not apply:

* * *

(b) to that portion of any loss arising out of the ownership, maintenance or use of aircraft or **automobiles** with respect to which the **insured** has other valid and collectible insurance, whether primary or excess.

* * * *

APPENDIX G — EXCERPTS FROM COMPREHENSIVE GENERAL LIABILITY INSURANCE — COVERAGE PART

[Page One]

COMPREHENSIVE GENERAL LIABILITY INSURANCE — COVERAGE PART

I. COVERAGE A — BODILY INJURY LIABILITY

* * *

Exclusions

This insurance does not apply:

* * *

(b) to **bodily injury** or **property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any **automobile** or **aircraft** owned or operated by or rented or loaned to the **named insured,** or

* * *

Appendix G

[Page Three]

DEFINITIONS

* * *

"insured" means any person or organization qualifying as an **insured** in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each **insured** against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

* * *

[Page Four]

"named insured" means the person or organization named in Item 1. of the declarations of this policy;

* * * *